

**United States Department of Labor
Employees' Compensation Appeals Board**

M.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southeastern, PA, Employer**

)
)
)
)
)
)
)
)

**Docket No. 06-2111
Issued: March 2, 2007**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2006 appellant filed a timely appeal from an April 3, 2006 decision of the Office of Workers' Compensation Programs' hearing representative who affirmed the denial of her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she is entitled to a schedule award for a permanent impairment to a scheduled member of the body under 5 U.S.C. § 8107.

FACTUAL HISTORY

On October 15, 1998 appellant, then a 40-year-old mail processor, filed an occupational disease claim alleging that on July 3, 1991 she first realized her lower back condition was due to

her employment duties. The Office accepted the claim for temporary exacerbation of preexisting L5-S1 degenerative disc disease.¹

In a report dated June 26, 2001, Dr. David Weiss, an osteopath, noted a history of appellant's work injuries. He diagnosed cumulative and repetitive trauma disorder, bilateral carpal tunnel syndrome, left lumbar radiculitis, chronic lumbosacral sprain and strain, left lumbar radiculitis and status post right endoscopic carpal tunnel syndrome release. Dr. Weiss concluded that appellant reached maximum medical improvement on June 19, 2001. He opined that in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (A.M.A., *Guides*) appellant sustained a 38 percent impairment of the right upper extremity,³ a 38 percent impairment of left upper extremity,⁴ and a seven percent impairment of the left lower extremity.⁵

On November 1, 2001 appellant filed a claim for a schedule award.

The Office referred appellant for a second opinion examination by Dr. Steven J. Valentino, an osteopath, for a determination of any permanent impairment as a result of her July 3, 1991 employment injury. On April 30, 2002 Dr. Valentino reported on a physical examination, review of the medical evidence and statement of accepted facts. He diagnosed resolved aggravation of preexisting L4-5 degenerative disc disease. Dr. Valentino concluded that appellant sustained no permanent employment injury and had no impairment. He reported that an MRI scan "showed no basis for radiculopathy." Dr. Valentino also noted that there was "no evidence of compression on an exiting nerve root."

The Office found a conflict of medical opinion between Dr. Weiss and Dr. Valentino. On April 4, 2003 it referred appellant to Dr. Barry A. Silver, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office asked Dr. Silver to provide an opinion as to whether the accepted conditions had caused any permanent impairment.

On May 16, 2003 Dr. Silver reviewed the medical records and provided a history and results on examination. He reported that appellant "has had intermittent symptoms and intermittent treating." A physical examination revealed negative Waddell's sign, generalized tenderness to palpation at the lumbar area, no spasm, no evidence of atrophy in the lower extremities and "she got every test right in terms of response to pinprick in her legs." Dr. Silver reported that a May 2001 MRI scan showed degenerative disc disease, "a high intensity signal in the posterior annulus at L5-S1," and "central indentation on the thecal sac." He determined that

¹ The record contains conflicting evidence as to whether the Office accepted the condition of herniated nucleus pulposus (HNP). In a July 18, 2003 note, the Office informed the Office medical adviser that appellant's claim had been expanded to include the condition of HNP. Subsequently the Office noted a herniated disc was not accepted "as the MRI [magnetic resonance imaging] scan results have not confirmed that this condition exists."

² A.M.A., *Guides* (5th ed. 2001).

³ *Id.* at 509, Tables 16-21 and 16-34, at 492, Table 16-15 and at 482, Table 16-10.

⁴ *Id.*

⁵ *Id.* at 424, Tables 15-15 and 15-18 and at 574, Figure 18-1.

appellant developed a L5-S1 left side and central lateral disc herniation due to her work-related incident in 1991. He noted his agreement with Dr. Weiss and disagreement with Dr. Valentino regarding appellant's condition. With respect to appellant's permanent impairment as a result of her lumbar injury, he stated:

"I think she would fit best into what would be called the DRE or Diagnosis-Related-Estimates regarding lumbar pathology that would fit into the DRE Lumbar Category #2 of minor impairment, that is, someone with some radicular symptoms but very little in the way of objective finding and intermittent problems and would fit a pattern of about five percent overall body loss of function or a five percent impairment to fit this category. She lacks any objective change other than the MRI [scan] but is to be awarded the impairment based on subjective radiculopathy and her MRI [scan] report in my opinion."

On July 18, 2004 the Office referred the medical evidence to an Office medical adviser. In an undated report, he opined that appellant had a three percent impairment of the left leg and a three percent impairment of the right leg.⁶ The medical adviser based these ratings on the findings of "intermittent bilateral symptoms along L5 nerve root" by Dr. Silver.

On August 21, 2003 the Office requested that Dr. Silver provide clarification regarding his impairment rating. The Office informed him that whole person ratings are not permitted under the Federal Employees' Compensation Act and that "[i]n back cases, a rating of impairment of the lower extremities is required."

In a supplemental report dated August 23, 2003, Dr. Silver stated:

"I think it is unfortunate that the Act does not concur with the guides (sic) to evaluation of permanent impairment that is the present standard by the [A.M.A., *Guides*] and which is the impairment rating that most disability evaluators are presently using for evaluation of injuries to the lumbar spine. I have been very specific about the impairment as far as total body impairment that this patient suffered as a result of her injury and that fits the [A.M.A., *Guides*,] or DRE category as in the fourth and fifth editions, that is the way things are done. The [A.M.A., *Guides*] is no longer using range of motion methods of impairment. The reason for this is because a patient like [appellant] has no loss of movement in her lower extremities and no neurologic deficit. That is why the new diagnoses related to impairments were decided upon by an *ad hoc* committee of specialists in this field."

On September 30, 2003 the Office referred Dr. Silver's August 23, 2003 supplemental report to an Office medical adviser. On October 6, 2003 he stated that appellant had no ratable impairment. The Office medical adviser noted that Dr. Silver found no motor or sensory impairment and no loss of movement. As these were the only factors which could be rated for schedule award in her low back claim, she had no ratable impairment under the Act.

⁶ *Id.* at 424, Tables 15-15 and 15-18.

By decision dated October 23, 2003, the Office denied appellant's claim for a schedule award.

In a letter dated October 28, 2003, appellant's counsel requested an oral hearing which was held on June 30, 2004.

By decision dated October 18, 2004, the Office hearing representative found that the case was not in posture for a decision. She remanded the case to the Office to obtain a supplemental report from the Office medical adviser regarding why he did not use Dr. Silver's diagnosed based impairment.

In a report dated December 1, 2004, another Office medical adviser concluded that appellant was not entitled to a schedule award. He noted the lack of sensory or motor loss of function found by Dr. Silver. As there was no motor or sensory deficit found by Dr. Silver upon clinical evaluation, the Office medical adviser concluded that it was inappropriate to have a schedule award based upon radiculopathy.

In a decision dated February 16, 2005, the Office determined that appellant was not entitled to a schedule award based on the evidence of record.

On February 22, 2005 appellant's counsel requested an oral hearing which was held on February 7, 2006.

By decision dated April 3, 2006, the Office hearing representative affirmed the February 16, 2005 decision.

LEGAL PRECEDENT

The schedule award provision of the Act⁷ and its implementing regulation⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁹

Section 8123(a), in pertinent part, provides: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ In situations where

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ 5 U.S.C. § 8123(a).

there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

In order to properly resolve a conflict in the medical opinion evidence with respect to a schedule award, it is the referee examiner who should provide a reasoned medical opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. An Office medical adviser may review the opinion, but resolution of the conflict is the responsibility of the referee examiner.¹²

ANALYSIS

Appellant contends that she is entitled to a schedule award for permanent impairment of the left lower extremity and the back. The Office accepted appellant's claim for temporary exacerbation of a preexisting L5-S1 degenerative disc disease. However, as noted, the Act does not permit a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper and lower extremities due to her accepted back condition.

The Office found a conflict in medical opinion existed between Dr. Weiss, appellant's examining physician, and Dr. Valentino, an Office referral physician. The conflict arose as to whether appellant had any permanent impairment of the lower extremities. The Office properly referred appellant to Dr. Silver to resolve the conflict.

In a May 16, 2003 report, Dr. Silver discussed appellant's condition pursuant to the A.M.A., *Guides*. However, he did not refer to specific page numbers, charts or tables for his impairment rating. It appears that Dr. Silver was addressing appellant's impairment in conjunction with whole person impairment. However, as the Board has held, a schedule award is not payable under the Act for impairment of the whole person.¹³ Accordingly, due to these deficiencies in the report of the impartial medical examiner, his report did not establish appellant's degree of impairment under the Act. The Office properly requested that Dr. Silver submit a supplemental report to address these deficiencies. On August 23, 2003 Dr. Silver estimated that appellant had a five percent whole person permanent impairment based upon her radicular symptoms. He noted that the impairment rating was based upon appellant's subjective radiculopathy. Dr. Silver stated his disagreement with the Act regarding impairment ratings and the lumbar spine. He did not address the deficiencies noted by the Office. As Dr. Silver's medical reports were not responsive to the Office's inquiry, it should have referred appellant for a second impartial examination. The conflict in medical opinion remains unresolved.

¹¹ *Darlene R. Kennedy*, 57 ECAB ____ (Docket No. 05-1284, issued February 10, 2006).

¹² See *Richard R. LeMay*, 56 ECAB ____ (Docket No. 04-1652, issued February 16, 2005); see also *Thomas J. Fragale*, 55 ECAB 619 (2004).

¹³ *Gordon G. McNeill*, 42 ECAB 140 (1990).

On remand, the Office should refer appellant, the case record and a statement of accepted facts to a second impartial medical specialist to determine the extent and degree of any employment-related impairment resulting from her accepted injury. After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's impairment.

CONCLUSION

The Board finds that this case is not in posture for a decision as there is an unresolved conflict in the medical opinion evidence regarding the extent and degree of any employment-related impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2006 is set aside and the case is remanded for further proceedings consistent with the above decision.

Issued: March 2, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board